Supreme Court, U.S.
FILED
SEP 20 1996
CLERK

No. 96-287

IN THE

Supreme Court of the United States

October Term, 1996

KLAYMAN & ASSOCIATES, P.C., and
LARRY KLAYMAN,

Petitioners,

v.

BALDWIN HARDWARE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT NEUNER*
THOMAS D. MACBLAIN
GARY M. BUTTER
MELISSA J. SZANTO
BRUMBAUGH, GRAVES, DONOHUE
& RAYMOND
30 Rockefeller Plaza
New York, New York 10012
(212) 408-2500
Attorneys for Respondent
Baldwin Hardware Corporation

Counsel of Record

Questions Presented

1. Can an appellant who cannot establish a right to *in forma pauperis* treatment under 28 U.S.C. § 1915 demand a free transcript of the proceedings thus taxing the cost of a trial transcript to the United States?

2. Have procedural safeguards been satisfied where a sanctioned attorney was on notice of the conduct which formed the basis for the sanctions, was given an opportunity to respond before the sanctions order was entered, and was given over six weeks to file a motion for reconsideration of the sanctions order?

3. Where a court has specified the conduct which forms the basis for sanctions imposed pursuant to its inherent powers or pursuant to 28 U.S.C. § 1927, and the record otherwise supports a finding of bad faith, is an express recitation of the words "bad faith" required for a district court's sanctions order to be upheld?

4. Can sanctions entered against a contumacious attorney pursuant to a court's inherent powers be affirmed where the trial court has provided specific notice of the conduct which forms the basis for the sanctions, and has reasonably conveyed to the attorney its belief that the cited conduct constitutes bad faith?

Statement Pursuant to Rule 29.6

The parent company of Baldwin Hardware Corporation is Masco Corporation.

The following is a list of affiliates which have issued shares to the public and which are owned by Parent Masco Corporation:

Galveston Houston Company
Masco Tech, Inc. (formerly Masco Industries, Inc.)
TriMas Corporation
Comfortex Corporation
Furnishings International, Inc.
Emco Ltd.

TABLE OF CONTENTS

Page

Questions Presented i

Statement Pursuant to Rule 29.6 ii

Table of Authorities vi

Statutes and Rules Involved 2

Statement of the Case 7

Argument 9

I. AFFIRMANCE OF THE SANCTIONS IMPOSED AGAINST PETITIONERS DOES NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS. 9

A. The Issue of Recusal for Alleged Ethnic Bias Is Not Properly Before This Court. 9

B. Petitioners Cannot Tax the Cost of a Trial Transcript to the United States Where They Have No Right to *In Forma Pauperis* Treatment Under 28 U.S.C. § 1915. 11

C. Due Process Was Not Denied When the Federal Circuit Did Not Address Non-Binding Judicial Ethical Standards Never Raised or Relied on by Petitioners. 13

D. The Notice and Opportunity Given to Respond in This Case Fully Satisfies Any Procedural Safeguards Which May Be Required. 16

II. AFFIRMANCE OF THE SANCTIONS DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS. 20

TABLE OF CONTENTS (Cont'd)

Page

A. Affirmance of Sanctions Under Circumstances Where the Record Independently Supports a Finding of Bad Faith Does Not Conflict With the Law of Other Circuits 20

1. Sanctions Under 28 U.S.C. § 1927 . . 20

2. Sanctions Issued Under the Court's Inherent Powers 21

B. Particularized Notice of the Sanctioning Authority Is Satisfied Where a District Court Provides Notice of the Objectionable Conduct and Reasonably Conveys Its Belief That the Conduct Constitutes Bad Faith. 22

CONCLUSION 24

APPENDIX A - JUNE 30, 1992 ORDER REGARDING PRO HAC VICE STATUS OF ATTORNEY LARRY KLAYMAN A.1

APPENDIX B - ORDER GRANTING MOTION TO STAY PRO HAC VICE ORDER AND GRANTING EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION A.4

APPENDIX C - ORDER DENYING MOTION FOR RECONSIDERATION OF PRO HAC VICE SANCTIONS A.5

APPENDIX D - EXCERPTS OF TRIAL TRANSCRIPT CONTAINING JUDGE KELLER'S DENIAL OF THE ORAL MOTION FOR RECUSAL A.6

TABLE OF CONTENTS (Cont'd)

Page

APPENDIX E - EXCERPTS FROM TRIAL TRANSCRIPT CONTAINING JUDGE KELLER'S SUA SPONTE PROPOSAL FOR PRO HAC VICE SANCTIONS . . A.18

APPENDIX F - EXCERPTS FROM TRIAL TRANSCRIPT CONTAINING ORAL MOTION FOR RECUSAL . . A.23

APPENDIX G - MEMORANDUM IN SUPPORT OF MOTION TO STAY PRO HAC VICE ORDER A.28

APPENDIX H - MOTION FOR ADDITIONAL EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION OF PRO HAC VICE ORDER A.31

APPENDIX I - MOTION FOR RECONSIDERATION OF PRO HAC VICE ORDER A.36

TABLE OF AUTHORITIES

Page

Cases

Delesdernier v. Porterie,
666 F.2d 116 (5th Cir.), *cert. denied*,
459 U.S. 839 (1982) 10

E. & J. Gallo Winery v. Gallo Cattle Co.,
955 F.2d 1327 (9th Cir. 1992) 10, 11

Fellheimer, Eichen & Braverman v.
Charter Techns., Inc.,
57 F.3d 1215 (3d Cir. 1995) 17, 21, 23

Foster v. Mydas Assocs., Inc.,
943 F.2d 139 (1st Cir. 1991) 22

Griffin v. Illinois,
351 U.S. 12 (1956) 11

Hernandez v. 65 de Infanteria Thom McAn, Inc.,
516 F.2d 1293 (1st Cir. 1975) 12

In re Charge of Judicial Misconduct,
62 F.3d 320 (9th Cir. 1995) 14

In re Evans,
524 F.2d 1004 (5th Cir. 1975) 17, 18

In re Yagman,
796 F.2d 1165 (9th Cir. 1896) 17, 18, 19

Jones v. Pittsburgh Nat'l Corp.,
899 F.2d 1350 (3d Cir. 1990) 17, 23

Martin v. Brown,
63 F.3d 1252 (3d Cir. 1995) 20, 21

TABLE OF AUTHORITIES (Cont'd)

Page

McDonough Marine Serv., Inc. v. M/V Royal Street,
608 F.2d 203 (5th Cir. 1979) 12

McGinnis v. Gustafson,
978 F.2d 1199 (10th Cir. 1992) 12

MGIC Indemnity Corp. v. McKenna, Conner & Cuneo,
952 F.2d 1120 (9th Cir. 1991) 20, 21

Pashaian v. Eccelston Properties, Inc.,
88 F.3d 77 (2d Cir. 1996) 14

Standing Committee on Discipline v. Ross,
735 F.2d 1168 (9th Cir. 1984) 16

United States v. Conforte,
624 F.2d 869 (9th Cir.), *cert. denied*,
459 U.S. 1012 (1980) 10

United States v. International Brotherhood of Teamsters,
948 F.2d 1338 (2d Cir. 1991) 20

United States v. Nazareth Andonian,
735 F. Supp. 1469 (C.D. Cal. 1990) 11

United States v. Stoneberger,
805 F.2d 1391 (9th Cir. 1986) 22

United States v. Tucker,
78 F.3d 1313 (8th Cir. 1996) 15

Zambrano v. City of Tustin,
885 F.2d 1473 (9th Cir. 1989) 22

TABLE OF AUTHORITIES (Cont'd)

Page

Statutes

28 U.S.C. § 455 . . . . . 2, 3, 8, 10, 13, 14, 15

28 U.S.C. § 1915 . . . . . 3, 4, 11, 12

28 U.S.C. § 1927 . . . . . 4, 8, 20, 21

Rules and Other Authorities

Fed. R. App. P. 10(a), (b) and (c) 4, 5, 6, 12

Fed. R. Civ. P. 11 20

Central District of California Local Rule 2.2.3.1 . . . . . 6, 16

Code of Judicial Conduct for United States Judges 6, 7, 13, 14

Webster's Third New International Dictionary 9

No. 96-287

IN THE

Supreme Court of the United States

October Term, 1996

KLAYMAN & ASSOCIATES, P.C., and
LARRY KLAYMAN,

Petitioners,

v.

BALDWIN HARDWARE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Baldwin Hardware Corporation prays that a writ of certiorari to review the judgment of the Federal Circuit in its cause Nos. 93-1185, -1186, entered on March 4, 1996 and modified on May 22, 1996, be denied. (For the convenience of the Court, all citations to the Opinion will be to the opinion attached as Appendix A to the Petition, and all citations to the oral argument on appeal will be to the transcript attached as Appendix D to the Petition).

Statutes and Rules Involved

28 U.S.C. § 455 (a), (b) and (f) - Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself of herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 1915(a) and (b) – Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefore. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) Upon the filing of an affidavit in accordance with subsection (a) of this section, the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

28 U.S.C. § 1927 - Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

Federal Rule of Appellate Procedure 10(a), (b) and (c)

Rule 10. The Record on Appeal

(a) Composition of the Record on Appeal. - The record on appeal consists of the original papers and exhibits filed in the district court, the transcripts of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court.

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered

(1) Within 10 days after filing the notice of appeal or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 4(a)(4), whichever is later, the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary, subject to local rules of the courts of appeals. The order shall be in writing and within the same period a copy shall be filed with the clerk of the district court. If funding is to come from the United States under the Criminal Justice Act, the order shall so state. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10-day time provided in paragraph (b)(1) of this Rule 10, file a statement of the issues the appellant intends to present on the appeal, and shall serve on the appellee a copy of the order or certificate and of the statement. An appellee who believes that a transcript of other parts of the proceedings is necessary shall, within 10 days after the service of the order or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of the designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must make satisfactory arrangements with the reporter for payment of the cost of the transcript.

(c) Statement of the Evidence or Proceedings When No Report Was Made or When the Transcript is Unavailable. - If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the district court in the record on appeal.

Central District of California Local Rule 2.2.3.1 - Permission pro hac vice

Any person who is not otherwise eligible for admission to practice before this Court, but who is a member in good standing of, and eligible to practice before, the bar of any United States Court, or of the highest court of any State, Territory or Insular Possession of the United States, who is of good moral character, and who has been retained to appear before this Court, may, upon written application and in the discretion of the Court, be permitted to appear and participate pro hac vice in a particular case.

Canon 3(C)(4) of the Code of Judicial Conduct for United States Judges provides:

Notwithstanding the preceding provisions of this Canon, if a judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge, spouse, or minor child, as the case may be, divests himself

of herself of the interest that provides the grounds for the disqualification.

Statement of the Case

The underlying litigation from which the issues now before this Court have emerged involved a patent infringement and unfair competition dispute between Respondent Baldwin Hardware Corporation ("Baldwin"), and FrankSu Enterprise Corporation, Frank Su, and Decorators Accessories, Ltd., each of whom were represented at trial by Petitioner Larry Klayman and his law firm Klayman & Associates.

During trial on the merits before Judge William D. Keller in the U.S. District Court for the Central District of California, Judge Keller apprised the parties of the past ownership by Judge Keller's mother's trust of stock in Masco Corporation ("Masco"); the parent company of Baldwin. Judge Keller was a beneficiary. The stock had been sold before Judge Keller's substantive involvement in the litigation, and before Judge Keller had any knowledge that Baldwin was owned by Masco. Petitioner Klayman first agreed that there was no conflict, but subsequently brought a motion for recusal alleging that Judge Keller had a financial conflict of interest. (A. 23-27).

Having been taken to task by Judge Keller for improper behavior, Petitioner Klayman also alleged that Judge Keller had exhibited bias against his client, and referenced several comments made by Judge Keller during trial as indicative of this bias. (A. 23-27). Petitioner Klayman did not indicate that he considered any of these remarks to be anti-Semitic or ethnically biased. Judge Keller fully addressed each point raised by Mr. Klayman, and denied the motion for recusal. (A. 6-17).

Near the end of trial, based upon repeated and profound misconduct, Judge Keller *sua sponte* apprised Petitioner Klayman of his intention to revoke Mr. Klayman's future *pro hac vice* rights

as sanctions for the conduct he exhibited during trial. (A. 18-22). Numerous instances of objectionable conduct were specifically recited by Judge Keller, and Mr. Klayman was given an opportunity to respond. On June 30, 1992, after the trial was completed, the sanctions order was entered. (A. 1-3). Baldwin was awarded a small part of its attorneys' fees that it had asked for under 28 U.S.C. § 1927.

Petitioner Klayman then filed a motion to stay the order and to allow 60 days to file a motion for reconsideration. (A. 28-30). Judge Keller granted the motion to stay and granted 30 days from that date to file the motion. (A. 4). In his order, Judge Keller clearly stated that no further extensions of time would be granted. Nevertheless, on August 12th, five days before the 30 day extension was to expire, Petitioner Klayman again filed a motion for an extension of time, which was ultimately denied. (A. 31-35). On August 17th, Petitioner Klayman filed his motion for reconsideration; a motion which was completely devoid of any challenge to the legal basis for the sanctions, or the manner in which they were imposed. (A. 36-39). The motion for reconsideration was denied, and the previously imposed stay on the sanctions order was lifted. (A. 5).

Subsequently, Petitioner repeatedly sought to obtain a trial transcript at a reduced cost by alleging financial distress. These requests were denied by the district court for failure to supply objective evidence of financial distress. Similar motions were repeatedly brought to the Federal Circuit. (Op. at App. 13-14). These too were denied. Petitioner Klayman chose not to purchase a transcript and did not supply one with his appeal to the Federal Circuit as required. He now claims the transcript that he failed to submit was essential to the Federal Circuit's review (Pet. at pp. 14-16).

On appeal, the Federal Circuit held that 28 U.S.C. § 455(f), which provides for divestiture of a belatedly discovered financial interest, squarely covered the facts of the case before it. The court

found that because the stock had previously been sold by the trust, Judge Keller was not required to recuse himself. With regard to the issue of alleged ethnic bias, raised for the first time on appeal, the court questioned whether this issue was properly before it. Nevertheless, the Federal Circuit found that the record did not support the allegations.

Argument

I. AFFIRMANCE OF THE SANCTIONS IMPOSED AGAINST PETITIONERS DOES NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS.

A. The Issue of Recusal for Alleged Ethnic Bias Is Not Properly Before This Court.

To the extent that Petitioners' arguments for recusal are based on allegations of "religious and nationally-based extra-judicial bias and prejudice", Pet. at p. 15, these arguments are not properly before this Court. Until the appeal to the Federal Circuit, allegations of ethnic bias were never raised by Petitioners. The transcript of the Klayman oral motion for recusal confirms that the only specific incident raised by Mr. Klayman on which he now relies as evidencing ethnic bias, is Judge Keller's reference to Richard Carter "and his ilk".[1] (A. 24). Never at the trial level did he so much as infer a belief that he considered this, or any other later cited comment, to indicate ethnic bias.[2] (A. 23-27).

---

[1] Judge Keller, a wordsmith, used "ilk" correctly. It means "kind." *Webster's Third New International Dictionary* 1126 (3d ed. 1986). The word is not pejorative. The late Ogden Nash correctly used the word, without pejorative intent when he wrote "The cow is of bovine ilk, one end moo, the other milk." Nash clearly harbored no ill will to cows.

[2] Witness Carter was president of defendant Decorators Accessories Ltd., a hardware distributor. His ethnic background was never mentioned at trial nor at any other time until it became an issue for Petitioners' appeal. His "ilk" or kind were fellow hardware distributors.

Furthermore, Judge Keller's response to the recusal motion gives no indication of any such allegation. (A. 6-17).

In its opinion, the Federal Circuit acknowledged the potential impropriety of this issue on appeal by stating

> Appellants never directly presented the issue of ethnic or racial bias to Judge Keller as a ground for recusing himself, nor did they afford Judge Keller an opportunity to address this issue. Under the circumstances, we question whether the matter is properly before us on appeal ... .

Op. at App. 9-10. Although the Federal Circuit did proceed to address the issue, it was correct in questioning whether the matter was properly before the court. Under circumstances where the grounds for a recusal motion would have been known long before a decision on the merits, the accusation was not made until after a decision was rendered. A motion for recusal is not timely if brought for the first time on appeal.

In *E. & J. Gallo Winery v. Gallo Cattle Co.*, 955 F.2d 1327 (9th Cir. 1992), the judge's previous involvement with a party's counsel's firm was known by the defendant at the time the case was transferred to the judge, but disqualification was not sought until appeal. The court stated that although a judge may be obligated to recuse himself under 28 U.S.C. § 455, "it does not necessarily follow that a party having information that raises a possible ground for disqualification can wait until after an unfavorable judgment ...". *Id.* at 1343. *See also United States v. Conforte*, 624 F.2d 869, 879-80 (9th Cir.) (motion for recusal based on allegations of personal bias against the defendant was held untimely since alleged incidents were known to defendant prior to appeal), *cert. denied*, 459 U.S. 1012 (1980). Likewise, the Fifth Circuit in *Delesdernier v. Porterie*, 666 F.2d 116, 119 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982), also refused to consider a motion for disqualification

which was raised for the first time on appeal and after a trial on the merits.

As in *E. & J. Gallo*, Petitioners belated (and baseless) allegations of ethnic bias represent an improper, after-the-fact attempt to attack an unfavorable judgment, and should not be entertained by this Court.[3]

B. Petitioners Cannot Tax the Cost of a Trial Transcript to the United States Where They Have No Right to *In Forma Pauperis* Treatment Under 28 U.S.C. § 1915.

Petitioners allege that their due process rights have been violated by the Federal Circuit's failure to independently obtain and review a transcript of the trial. A closer examination of the facts of this case, however, reveals that Petitioners are merely attempting to tax the cost of the transcript to the United States, after being conclusively found not entitled to *in forma pauperis* treatment.

In *Griffin v. Illinois*, 351 U.S. 12 (1956), this Court held that a state cannot deny appellate review solely on the grounds that the appellant is too poor to obtain the required transcript. In the present case, however, 28 U.S.C. § 1915 provides the precise relief which was unavailable in *Griffin*; it allows an appellant to tax the cost of a transcript on appeal to the United States if that appellant is indigent. Petitioners have twice failed to provide information sufficient to establish a right to *in forma pauperis* treatment. As a result, Petitioners were refused a free transcript. This decision was never actually contested on appeal. Petitioners

[3] As they did before the Federal Circuit, Petitioners make much of Judge Keller's likening Mr. Klayman to another troublesome attorney, a Mr. Schmuckler. Judge Keller did not call Mr. Klayman by this name, nor did he concoct it. Mr. Martin L. Schmuckler had previously appeared before Judge Keller. *See United States v. Nazareth Andonian*, 735 F. Supp. 1469 (C.D. Cal. 1990).

are not entitled to *in forma pauperis* treatment or the transcript they declined to purchase.

In circumstances where an appellant cannot establish a right to *in forma pauperis* treatment under § 1915, the Federal Rules of Appellate Procedure require the appellant to "order from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary." Fed. R. App. P. 10(b). If the appellant fails to supply the appellate court with a record sufficient to decide the issues set forth on appeal, the appellate court may affirm the lower court's ruling without considering those issues. *See, e.g., McGinnis v. Gustafson*, 978 F.2d 1199, 1200-01 (10th Cir. 1992) (appellant's failure to file required transcript left "no alternative but to affirm"); *McDonough Marine Serv., Inc. v. M/V Royal Street*, 608 F.2d 203, 204 (5th Cir. 1979) (lack of trial transcript which was essential to determination on appeal left court with no alternative but to affirm); *Hernandez v. 65 de Infanteria Thom McAn, Inc.*, 516 F.2d 1293, 1296-97 (1st Cir. 1975) (affirmed district court's refusal to accept claim of good faith since appellant did not provide court with transcript).

Petitioners failed to establish a right to *in forma pauperis* treatment, and they failed to fulfill their obligation of supplying a record for appeal. Like the apocryphal, the patricide defendant pleading for the court's mercy as an orphan, Petitioner Klayman now seeks to avoid the implications of his own malfeasance, arguing that his due process rights were violated because the Federal Circuit did not review in its entirety a transcript he declined to provide.[4] In effect, Petitioners seek a ruling from this Court that fiscally sound appellants may transfer the financial burden of supplying a transcript on appeal to an appellate court, their adversaries or the court reporter, all of whom in this case adamantly refused to be taken advantage of. Surely due process does not require a ruling in Petitioners' favor.

---

[4] The District Court does not itself possess a transcription of the tapes of the trial proceedings. (Op. at App. 13, n. 5).

C. Due Process Was Not Denied When the Federal Circuit Did Not Address Non-Binding Judicial Ethical Standards Never Raised or Relied on by Petitioners.

The Petition to this Court states:

> "While Petitioners had relied on the Judicial Code of Conduct in support of their arguments that the trial judge's orders must not be given any force or effect due to the appearance of extra-judicial bias and prejudice and a financial conflict of interest, the Federal Circuit failed to address it in its decision."

Pet. at p. 10. This clearly mischaracterizes the record. Petitioners never raised, let alone relied on, the Code of Judicial Conduct (the "Code") in their oral motion for recusal, in their Appeal Brief to the Federal Circuit, or in their oral argument before the Federal Circuit. In the only mention of the Code prior to the Petition to this Court, the Federal Circuit referred to the Canons during the following colloquy with respondent's counsel:

> THE COURT: Do you -- are you acquainted with the Canons? I don't have them immediately in mind but I wonder if there isn't an obligation?
>
> MR. MACBLAIN: I looked only into the statute, Your Honor. And I didn't see any -- but I had in mind only the 455(a) which is the appearance of a conflict.
>
> THE COURT: Well, you do know that the Canons are more rigorous than the statue?

(Arg. at App. 52). The Judicial Canons were only mentioned in passing by the Federal Circuit. They formed no part of the arguments on appeal.

Regardless of Petitioners' failure to raise or rely on the Canons, the Code of Judicial Conduct are non-binding guidelines for conduct. They do not provide an independent basis for appeal. "[T]he Code is not designed or intended as a basis for civil liability or criminal prosecution." *Code of Conduct for United States Judges*, Canon 1, commentary (1992). *See also In re Charge of Judicial Misconduct*, 62 F.3d 320, 322 (9th Cir. 1995) ("[t]he Canons are aspirational goals, voluntarily adopted by the judiciary itself, designed to provide guidance ... , but those ethical standards should never supersede the congressionally set standards for the imposition of discipline."); *Pashaian v. Eccelston Properties, Inc.*, 88 F.3d 77 (2d Cir. 1996) (the Code of Judicial Conduct is not independently enforceable on appeal).

Finally, and equally as compelling, the Petitioners allegations of a financial conflict of interest is utterly frivolous; Canon 3 of the Code of Judicial Conduct follows 28 U.S.C. § 455(f) almost verbatim:

> Notwithstanding the preceding provisions of this Canon, if a judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he ... individually ... has a financial interest in a party ... disqualification is not required if the judge .... divests himself or herself of the interest that provides the grounds for the disqualification.

Petitioners include this provision of Canon 3 in their Petition under "Rules Involved" (Pet. at pp. 4-5), but it is conspicuously absent from their legal argument.

The argument that due process was denied by the Federal Circuit's failure to refer to a Canon containing an exception virtually identical to the statutory exception on which the court relies in reaching its decision is both untenable and frivolous. Even if the Canons had the force of law, they do not provide "more stringent" standards than those on which the district and appellate courts relied.

In their argument that the Federal Circuit failed to address the Judicial Canons, Petitioners assert that the Federal Circuit failed to address "black letter" case law that only an appearance of impartiality is necessary to disqualify a trial judge. (Pet. at p. 20.)

The Federal Circuit in fact stated:

> In the interest of ensuring that justice not only is impartial *but appears so*, we have reviewed the record to determine in the first instance whether it would have constituted plain error for Judge Keller to have refused recusal under § 455(a) and (b)(1) (emphasis added).

Op. at App. 10. The Federal Circuit thus properly considered whether an appearance of impartiality required recusal.[5] The basic tenet of avoiding even the appearance of impropriety is so fundamental to bench and bar as not to require research and lengthy exposition.

---

[5] An appearance of impartiality is still governed by an objective standard of reasonableness. It must be such that a "reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996).

D. The Notice and Opportunity Given to Respond in This Case Fully Satisfies Any Procedural Safeguards Which May Be Required.

Petitioners raise procedural due process for the first time here. It is not properly before this Court.

Central District of California Local Rule 2.2.3.1 provides that attorneys who are in good standing of a bar of any United States Court, and are of good moral character, *may* in the *discretion of the court*, be admitted to appear *pro hac vice* in a particular case. As indicated by the Federal Circuit, a court which has the power to admit attorneys *pro hac vice* also has the power to sanction them for unprofessional conduct. Op. at App. 21-22 (*citing Standing Committee on Discipline v. Ross*, 735 F.2d 1168, 1170 (9th Cir. 1984)). Petitioners assert that before a court can exercise this power to sanction an attorney by denying that attorney future *pro hac vice* rights, it must provide "a full panoply of procedural safeguards." Pet. at p. 22. However, Petitioners gloss over the facts of the present case. They were provided with particularized notice of the bad faith conduct for which they were sanctioned, they were given an opportunity to respond to the charges when they were first raised at trial, and they were given almost seven weeks from the time the order was entered (the order was stayed during the majority of this time) to obtain counsel and prepare a motion for reconsideration. Despite notice and opportunity, Petitioners made no response. Now Petitioners seek a further chance to challenge the sanctions by their tenuous due process argument.

The *pro hac vice* sanctions were first raised *sua sponte* by Judge Keller at the end of a trial prolonged and disrupted by Petitioner Klayman's misbehavior. Judge Keller specifically pointed out instances of conduct which "seriously violated the standards of practice," including "misrepresentations" made to the court. (A. 19-21). This conduct was spelled out again in Judge Keller's June 30, 1992 order imposing sanctions. (A. 1-3). Petitioners were aware of the conduct that formed the basis for the

sanctions. As recognized by the Federal Circuit, it was also clear that Judge Keller considered Petitioners' "misrepresentations" to constitute bad faith. Op. at App. 22.

Petitioners cite *Jones v. Pittsburgh Nat'l Corp.*, 899 F.2d 1350 (3d Cir. 1990); *In re Evans*, 524 F.2d 1004 (5th Cir. 1975); and *In re Yagman*, 796 F.2d 1165 (9th Cir. 1896), to support their due process argument. In *Jones*, the court did state that prior to sanctioning an attorney, "a court must provide the party to be sanctioned with notice and some opportunity to respond to the charges." *Jones*, 899 F.2d at 1357. The notice and opportunity referred to in *Jones*, however, was later qualified in *Fellheimer, Eichen & Braverman v. Charter Techns., Inc.*, 57 F.3d 1215 (3d Cir. 1995) ("*FE&B*"), a case in which the facts and legal issues closely resemble those presently before this Court.

In *FE&B*, the court held that adequate notice had been given where the sanctioned party was aware of the objectionable conduct, and was aware that it was accused of having acted in bad faith. *Id.* at 1225-26. As support for its finding of adequate notice, the court cited to the following statement made by the court during the hearing:

> [F]or Mr. Burke to get upset because the creditors committee thinks that he's incompetent, is unfortunate. You ... have to tone him down. You can't file this kind of lawsuit that you filed here just because Mr. Burke is upset. That's ridiculous ... [T]his whole litigation is a lot of nonsense.

Thus, the Third Circuit found adequate notice where the court had pointed out the conduct which formed the basis for the sanctions, and did so with language which reasonably conveyed a belief that bad faith was present. Likewise, in the case at bar, specific acts of conduct were cited in a manner that clearly conveyed the district court's belief that, at the very least, Petitioners' misrepresentations constituted bad faith. While the notice in *FE&B* was given before

the sanctions order was entered, the court's rationale is equally applicable to the present case where Petitioners were given an opportunity to respond both before the sanctions order was entered, and while the sanctions order was stayed pending an opportunity for Petitioners to submit a motion for reconsideration. (Judge Keller considerately placed the sanctioning order under seal awaiting petitioners' motion; (A. 4)).

The *Evans* case, also cited by Petitioners, does not support Petitioners position. *Evans* involved a judge's attempt to deny an application for admission *pro hac vice* based on an attorney's actions in previous unrelated proceedings before that judge, rather than as sanctions for conduct in a case pending before him. The attorney received no notice during these previous proceedings that his conduct was objectionable, and he was not allowed to participate or address the court in support of his motion for admission *pro hac vice*. This is a stark distinction to the careful actions of Judge Keller. In contrast, in the present case Petitioner Klayman was apprised of Judge Keller's displeasure with his actions when the sanctions were raised at trial, and he was given an opportunity to respond at trial and an extended opportunity to respond in a motion for reconsideration.

Finally, contrary to Petitioners' assertions, the facts of this case did not require a different judge to preside over the sanctions issue. Confrontations between an attorney and a judge during trial over issues arising out of the trial, without more, do not provide grounds to remove from that judge the power to impose sanctions. The Ninth Circuit in *Yagman* reached precisely this conclusion, stating

> ... although it is obvious that Yagman and Judge Real clashed several times during the trial over various objections, evidentiary matters, and rule violations, we find none of it remarkable enough to indicate a need for Judge Real to disqualify himself from deciding the issue of sanctions. A judge may

> impose sanctions ... at his or her initiative. When this occurs, the judge will obviously be dissatisfied with some aspect of the offending attorney's conduct. Often the judge will be angry with the attorney for violating one or more rules. Without more, this natural responsive attitude does not provide reasonable grounds to question the judge's impartiality, either because of the appearance or the fact of bias or prejudice, in presiding over the sanctions proceeding.

Yagman, 796 F.2d at 1182. Petitioners have not and cannot show that Judge Keller's criticisms of Mr. Klayman were anything more than natural and reasonable reactions to Mr. Klayman's continuous refusals to follow court instructions, misrepresentations, delays and antagonizing tactics. Under such circumstances, due process did not require a different judge to supervise the sanctions issue. No case so holds.

The particularized notice and the ample opportunity to respond given to Petitioners in this case fully satisfies any procedural safeguards that may be required before a court may enter *pro hac vice* denial sanctions.[6] After their failure to avail themselves of the opportunity, Petitioners' due process argument is nothing more than an attempted second bite at an unavailing apple. Due process does not require, and the interests of justice dictate against, awarding Petitioners this second bite.

---

[6] The denial of future *pro hac vice* admission and the requirement of notification of other judges of the district in future applications was exactly correct as the court found that in applying for *pro hac vice* admissions Mr. Klayman had falsely stated that he had never previously been sanctioned.

II. AFFIRMANCE OF THE SANCTIONS DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

A. Affirmance of Sanctions Under Circumstances Where the Record Independently Supports a Finding of Bad Faith Does Not Conflict With the Law of Other Circuits.

Sanctions issued pursuant to either 28 U.S.C. § 1927 or a court's inherent powers require a finding of bad faith. The Federal Circuit found bad faith. No case requires that a district court expressly recite the words "bad faith" in its sanctions order as Petitioners suggest. Affirmance of sanctions on appeal is proper where the record otherwise supports a finding of bad faith. There is no conflict among the Circuit Courts of Appeal on this issue.

1. Sanctions Under 28 U.S.C. § 1927

In *United States v. International Brotherhood of Teamsters*, 948 F.2d 1338, 1347 (2d Cir. 1991), cited by Petitioners, the Second Circuit expressly stated that an appeals court may affirm sanctions "on any ground that finds support in the record." Remand was necessary, however, because, contrary to this case, the record was unclear as to which acts the district court had relied on for sanctions imposed under both Rule 11 of the Federal Rules of Civil Procedure and under § 1927. "[T]he present record is too obscure to leave us comfortable in reaching out for alternative grounds to affirm." *Id.*; *see also*, *MGIC Indemnity Corp. v. McKenna, Conner & Cuneo*, 952 F.2d 1120, 1122 (9th Cir. 1991) ("In some § 1927 cases we have examined the record when the district court's sanction order did not contain an explicit finding of bad faith.").

Similarly, in *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995), also cited by Petitioners, a sanctions order was vacated on appeal since the district court did not specify *any* conduct, thereby

rendering the court's task of determining whether the district court properly exercised its discretion "impossible on the record now before us." *Id.* at 1264. Thus, the order was vacated because the record could not support a finding of bad faith, not because the district court did not expressly recite a finding of bad faith in the order as Petitioners aver.

The above decisions also indicate that sanctions issued under § 1927 may be affirmed on appeal, despite the absence of a specific recitation of the words "bad faith," so long as the record otherwise supports such a finding. Petitioners have cited no law to the contrary. In fact there is no conflict of law among the circuit courts of appeals.

In this case, the Federal Circuit held that the record "leaves no doubt that [Judge Keller] considered K&A's conduct with regard to the proceedings for which sanctions were imposed to be at least reckless," and that the "record supports Judge Keller's assessment." Op. at App. 20. Recklessness *is* bad faith. *MGIC*, 952 F.2d at 1122. Affirmance of the sanctions by the Federal Circuit was entirely proper.

2. Sanctions Issued Under the Court's Inherent Powers

Similarly, where the record supports a finding of bad faith, sanctions issued pursuant to a court's inherent powers are affirmed even without actual utterance of the words "bad faith."

In *Fellheimer, Eichen & Braverman v. Charter Techn., Inc.*, 57 F.3d 1215 (3d Cir. 1995) ("*FE&B*"), discussed, *supra.*, at pp. 17-18, the Third Circuit upheld a sanctions order under precisely such circumstances. In *FE&B*, the bankruptcy court which imposed the sanctions never made an express finding of bad faith. The Third Circuit upheld the sanctions after concluding that FE&B had notice of the conduct which the court relied on, and was aware that it stood accused of acting in bad faith.

In support of the argument that the words "bad faith" must appear in a sanctions order, Petitioners have cited *United States v. Stoneberger*, 805 F.2d 1391 (9th Cir. 1986); and *Zambrano v. City of Tustin*, 885 F.2d 1473 (9th Cir. 1989), which relies on *Stoneberger*. In each of these cases, a sanctions order issued pursuant to the court's inherent powers was vacated where there had been no finding of bad faith by the district court. In *Stoneberger*, the court vacated the sanctions after stating "[o]n the record ... there is no basis on which the [sanctions] can be upheld." *Stoneberger*, 805 F.2d at 1394. Likewise, in *Zambrano*, the court vacated the sanctions order because "mere negligent violation of the [local] rules" could not form the basis for monetary sanctions. *Zambrano*, 885 F.2d at 1480. In both cases the order was vacated because the record did not support a finding of bad faith, rather than because the magic words "bad faith" were missing from the order. Thus, neither *Stoneberger* nor *Zambrano* hold that sanctions cannot be confirmed in the absence of a trial court order explicitly using the words "bad faith," where, as here, a party is specifically advised of conduct that is the essence of bad faith, such as misrepresentation and deceit, thus providing a record that unquestionably supports a finding of bad faith. Accordingly, Petitioners have shown no conflict among the courts of appeals. Indeed, there is none.

B. Particularized Notice of the Sanctioning Authority Is Satisfied Where a District Court Provides Notice of the Objectionable Conduct and Reasonably Conveys Its Belief That the Conduct Constitutes Bad Faith.

As a general rule, a district court must specify the sanctioning authority and the objectionable conduct when imposing sanctions. The particularized notice requirement is satisfied, however, where a sanctioned party was on notice of the objectionable conduct, and was reasonably apprised that the court perceived the specified conduct to constitute bad faith. *See Foster v. Mydas Assocs., Inc.*, 943 F.2d 139 (1st Cir. 1991) (an "unmistakable implication" will suffice).

The view that an implication will suffice is in harmony with the purpose of the rule requiring particularized notice, which is to put "a party on notice as to the particular factors that he must address if he is to avoid sanctions." *Fellheimer, Eichen & Braverman v. Charter Techn., Inc.*, 57 F.3d 1215, 1225 (3d Cir. 1995) (*citing Jones*, 899 F.2d at 1357).

In *Fellheimer*,[7] the bankruptcy court which imposed the sanctions never indicated that it was acting pursuant to its inherent powers. On appeal from the bankruptcy court, the district court raised this as the legal authority for the sanctions. Although the sanctioning authority was not expressly recited by the bankruptcy court, the Third Circuit held that particularized notice had been given where the record indicated that the attorney was on notice of the objectionable conduct, and the court's belief that it evidenced bad faith.

As in *Fellheimer*, Petitioner Klayman was more than sufficiently made aware of the conduct the court considered to be sanctionable. That his "misrepresentations," cited by the court, were considered bad faith were inescapably clear. As the Federal Circuit found, the "order made clear" that Judge Keller considered Petitioners' conduct, "particularly by making certain misrepresentations to the court", to constitute bad faith. This is true as well of Petitioners' continuous refusal to follow court orders. Having provided notice sufficient to satisfy the purpose behind the particularized notice requirement, the imposition of sanctions by the district court was proper, as was their affirmance by the Federal Circuit.

---

[7] See discussion, *supra.*, at pp. 17-18, and p. 21.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

Respectfully submitted,

BRUMBAUGH, GRAVES, DONOHUE
& RAYMOND

ROBERT NEUNER
THOMAS D. MACBLAIN
GARY M. BUTTER
MELISSA J. SZANTO
30 Rockefeller Plaza
New York, New York 10012
(212) 408-2500

Attorneys for Respondent
Baldwin Hardware Corporation

APPENDIX

APPENDIX A - JUNE 30, 1992 ORDER REGARDING PRO HAC VICE STATUS OF ATTORNEY LARRY KLAYMAN

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP., et al.

Defendants.

ORDER

As the result of misconduct both before and during trial, this Court sua sponte raises the issue of attorney Larry Klayman's pro hac vice status.

Appearing pro hac vice is not a right guaranteed by statute or the Constitution. *Leis v. Flynt*, 439 U.S. 438, 442 (1979). It is instead a privilege and an accommodation accorded out-of-state counsel. *See* Local Rule 2.2.3.1 (permitting "in the discretion of the Court" an attorney not otherwise eligible to practice before Court to do so in a pro hac vice capacity).

In the early stages of the present case, Mr. Klayman applied to appear pro hac vice pursuant to Local Rule 2.3.2. This Court exercised its discretion and granted him permission to make such an appearance. This Court now, after an extensive trial, elects to exercise its discretion to preclude Mr. Klayman from practicing before it again in a pro hac vice capacity. This conclusion is based upon a pattern of misconduct, including he following incidents:

1. On numerous occasions, Mr. Klayman failed to follow explicit Court orders. This disobedience included but was not

limited to his failure to file requested pleadings and documentation in a timely fashion; his continued use of "speaking objections" despite the Court's repeated admonitions to cease such interruptions; his refusal to directly answer the Court's questions; and his insistence on making further argumentation when he had been ordered by the Court to cease speaking. All of these actions considerably delayed a prompt adjudication of this matter.

2. Mr. Klayman represented that he required a continuance of the trial date to obtain the presence of his client, Mr. Frank Su, a resident of Taiwan. Based upon this representation, a continuance was granted. When trial commenced on the continued date, Mr. Su was not present in court despite a representation by Mr. Klayman that he was in Los Angeles and conducting his business. The Court perceives this as being completely inconsistent with his representation as to the necessity of a continuance. In fact, Mr. Su did not appear in court until the second week of trial.

3. Mr. Klayman represented to the Court that a particular piece of evidence, the Sepco catalog, had not been produced during discovery because it was "after discovered" evidence. This representation was directly contradicted by the testimony of his own client, Mr. Carter, who stated that he had made counsel aware of the catalog well before the close of discovery. The Court believes this misrepresentation was, at the least, negligent.

4. During the course of trial, Mr. Klayman represented to the Court that a patent issued to a company by the name of Eurotech existed which was quite similar to the patents at issue in the suit. The Court ordered him to produce evidence of such a patent and he failed to do so. Opposing counsel subsequently produced an earlier letter from Mr. Klayman's office indicating that no evidence existed of a Eurotech patent.

5. Mr. Klayman failed to represent his client in a timely fashion. He made an untimely jury demand and, despite notice from the plaintiff's counsel, did not comply with 15 U.S.C. § 282 which requires that prior art in a patent case be identified 30 days prior to trial.

6. Mr. Klayman did not comply with several discovery requests propounded by opposing counsel, who in turn were forced

to secure Orders to Compel from the Magistrate. Mr. Klayman only partially complied with those orders.

7. Finally, Mr. Klayman represented to the Court that he had never been sanctioned or denied pro hac vice privileges in any other court. This Court's review of the pleading in a related libel case reveals that Mr. Klayman was sanctioned on at least one other occasion for misconduct under both 28 U.S.C. § 1927 and Fed. R. Civ. P. 11. *Klayman & Gurley, P.C. v. Peter Scott*, 1989 U.S. Dist. LEXIS 13638 (D.D.C. November 15, 1989).

This Order is prospective in nature. Any future application to practice pro hac vice before this judge will be DENIED. In addition, Mr. Klayman is ORDERED to attach a copy of this Order to any future pro hac vice applications in this District.

IT IS SO ORDERED.

/s/
William D. Keller, Judge
United States District Court

Dated: June 30, 1992

APPENDIX B - ORDER GRANTING MOTION TO STAY PRO HAC VICE ORDER AND GRANTING EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

CIVIL MINUTES - GENERAL

Judge William D. Keller July 17, 1992

Before the Court is defense counsel's motion for a stay of this Court's June 30, 1992 Order regarding the pro hac vice status of Larry Klayman. Defense counsel indicates that he intends to retain counsel to seek reconsideration of this order. The motion is GRANTED. The Court's June 30, 1992 Order is ORDERED put under seal until the Court directs otherwise. Defense counsel shall file his motion for reconsideration within thirty (30) days of the date of this Order at which time the Court will take the matter under submission. No extensions of time will be granted.

IT IS SO ORDERED.

APPENDIX C - ORDER DENYING MOTION FOR RECONSIDERATION OF PRO HAC VICE SANCTIONS

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

CIVIL MINUTES - GENERAL

Judge William D. Keller August 21, 1992

Before the Court is defense counsel's motion for reconsideration of the Court's June 30, 1992 Order. After full review of defense counsels submission, including Mr. Larry Klayman's declaration, this Court finds that the motion is without merit. Accordingly, the motion is DENIED. The Clerk of the Court is ORDERED to unseal this Court's June 30, 1992 Order.

IT IS SO ORDERED.

APPENDIX D - EXCERPTS OF TRIAL TRANSCRIPT CONTAINING JUDGE KELLER'S DENIAL OF THE ORAL MOTION FOR RECUSAL

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

pp. 1584-1605

Next issue, defendants have moved for the court to recuse itself form this case. The legal standard regarding refusal is set forth in Title 28 Section 455(a) and it is required, quote, only if the bias or prejudice stems from an extrajudicial source and not from the conduct or rulings made during the course of the proceedings, end quotes. *Toth v. Trans World Airlines*, 862 F.2d, 1381 and 1388, Ninth Circuit 1988.

The test for disqualification under section 455(a) is an objective one whether a reasonable person with knowledge of all of the facts would conclude that the judge's impartiality might reasonably be questioned. In that regarding see *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864 at 871 Ninth Circuit 1971.

In their motion the defendants identify only one extrajudicial source upon which a refusal motion could be based. Namely the court's past interest in Masco Corp. The court has previously

addressed this issue after making full disclosure of the relevant facts. Accordingly defendants motion for refusal under section 28 U.S.C. 455(a) is denied.

Now, what counsel is really about here is alleging that over and above a refusal as indicated in section 455(a) or (b) as the case may be, that the court has engaged in misconduct. That is what you are saying. There is a case that is entitled *Pau v. Yosemite Park and Curry Company* 928 F.2d 880, Ninth Circuit 1991, hadn't previously been cited to me. At page 885 they address the segue, if you will, between disqualification or recusal under 455 and judicial misconduct. And they say in part at 885, I am going to read a good portion of the section. In says:

The Paus cannot sustain that burden here, that is the recusal burden under 455(a). All of their allegations relate to incidents during the course of the proceedings. And recusal under section 455 is required, quote, only if the bias or prejudice stems from an extrajudicial source and not from the conduct or rulings made during the course of the proceedings end quotes, citing the Toth case which I earlier cited on the record. Even if we were to review the Paus recusal claim as a charge of judicial misconduct their appeal on this point is meritless.

Let me say this, that I can't rule on judicial misconduct. I can rule on recusal, but I can't rule on judicial misconduct and I am well aware of that. However, not having had judicial misconduct charged against me in seven and a half years, I think it is a good idea to address what you are saying.

Continuing with the opinion, quote, litigants are entitled to a judge who is detached, fair and impartial, closed quotes. *Shad v. Dean Witter Reynolds, Inc.* 799 F.2d 525 531, Ninth Circuit 1986, stated for reversal on the basis of judicial misconduct in a civil trial is nevertheless quite high. Now, I will pause for a second and say to you, listen to this and see if its sounds familiar, comments by the judge require reversal if the judge expresses his opinion on an ultimate issue of fact in front of the jury or argues for one of the parties. Reversal, and I stress this, this is what I am looking for, reversal will not be required where the judge emphasizes evidence, nor where the judge expresses skepticism, provided that the witness

has an opportunity to respond. Parenthetically, obviously a chance to respond, closed parenthetical.

Continuing, cutting comments to counsel, and I don't acknowledge that here, any comment I made here was more than warranted and I believe under the totality of the circumstances that I have acted in a very restrained fashion and I believe in many courts you would have been held in contempt for what went on the other day when you continually interrupted when I told you to be quiet.

Continuing, cutting comments to counsel, particularly those related to skill, rather than good faith or integrity will not generally mandate reversal.

Now, that is the analysis that applies to this case, albeit not identified by Mr. Klayman. In other words you didn't parse it and I might add that this is reflective of the totality of the conduct in this case. I will parse it and I have parsed it.

Now, let's talk about you complaints, and Mr. Klayman, let me say to you that most assuredly, under the law, you are required to vigorously represent you client and if you perceive misconduct, by all means address it. I don't want to in any way impact upon you litigative ardor, all right? Not at all, but your having made comments regarding my prejudgment of the case and/or bias, and this case, if it goes to an Appellate panel, I want them to know what happened from my standpoint.

I have ordered a copy of the transcript which related to your motion to recuse or citing judicial misconduct as I am recasting it in part. And I have sought to identify the complaints which you addressed, and which I repeat, most properly should address. But equally properly I should respond and I am going to respond.

And let me pause for a moment to say this, I don't need to say it, the record will reflect, you were given the absolute every possible opportunity to vigorously defend your client and in no way any motion or conduct or lack thereof on your part impacted your client and it won't. This is not a popularity contest. This is not something where the court makes any decisions based upon legal skill. This is a case where this court must and will and has at all

times made its decision based upon the facts and the law. Now, let's look to what you identified.

Page 1173, questioning Frank Su's honesty. I believe as I recollect what transpired here, that I indicated to you as his counsel, that I did not believe as regard some of his testimony that he was forthright and/or forthcoming. In that regard I reference you to the considerable impeachment that took place and/or the admissions that were made during the course of Mr. Su's deposition. He testified on this witness stand and was directly contradicted on several occasions by what he had said in his deposition.

Furthermore, from a circumstantial evidence standpoint his denial of the lack of knowledge regarding certain individuals, i.e. suppliers, et cetera, did not appear to be entirely credible and he was not forthcoming, seemingly, as regards the relationship that he had with certain of the suppliers and/or others that were involved in this litigation.

Now, it is my role to make a factual determination here of what happened and one, let's put it this way, a principal reason that I identified my concern regarding Mr. Su, without making a final judgment because I haven't heard all the evidence, is it was an attempt to cure the problem, namely my statements were made early on and it was meant to assist. I think that I said to you something to the effect have you ever been to a boxing match, and you said no, but I watched it on television. I said did you ever see somebody give the smelling salts in the corner. I don't remember what your response was but I told you analogously you better give him some salts and tell him that the judge is listening carefully and to be forthright and forthcoming, because for whatever reason the judge doesn't believe you always have been to this juncture.

Now, again, I say to you, Mr. Klayman, I have tried a number of lawsuits. I am to being immodest. I tried a lot of lawsuits. I stood at that very lectern in 1961 and argued an appellate case right here 31 years ago. I have been at it a while and I will tell you as a litigator to receive an input from the trier of fact regarding my client, I then viewed and now view, as very helpful. I don't have to say anything. You are right. But I am not a balls-and-strikes

judge. You are going to get sleeves up and you are going to get a response in this case that is based on the facts, and the facts and the law only and personalities have nothing to do with it. And if you can find anybody who thinks they have had a case tried here decide here based on personality, identify them to me. Let me say this, that is not an empty invitation. You are not going to find that.

Now, for the reasons stated, my observations regarding Mr. Su were, in my view, entirely proper, and I repeat, there was no final decision. I have not heard all his testimony. I still haven't heard all his testimony.

Number two, referring to Richard Carter and his ilk, page 1173 or the transcript, I will give you an impression of Carter. He doesn't seem to be here this morning. Carter is an intelligent man. Carter knows this industry. You didn't load his gun very well because you don't back him up with catalogues and items that were in the marketplace. So what you do is you lean totally on his credibility to this point, I stress that, to this point. But is he credible? Is he knowledgeable? Of course he is. And I don't believe that if I said Richard Carter and his ilk, number one, I don't recall it, but if I said it, it was people in a like situation, all right? There was nothing meant in a negative tone regarding Carter and I don't have that feeling.

Number three, ordering Frank Su back to court but not Anthony Sturrus, Mr. Sturrus, for the record, has been present in this courtroom for the great majority of this trial. It would exceed 90 percent of the trial, more like about 98 percent of the trial. My impression was that Mr. Sturrus would be here for the duration of the trial and my impression of Mr. Sturrus was that he was versed in the American legal system and that he wold indeed be responsive.

In contrast, Mr. Frank Su, he doesn't know the system as far as I can tell. I am going to get to this operation that you complained about also, but he doesn't know the system and we delayed trial in this case for a day or two, I lost a day or two because at the last moment you said look it, I need more time. I gave it to you, I gave you more time. Not exactly indicative of

any type of prejudice or animus on my part. I gave you more time, so he could get here. And what happens? We start the case and there is no Mr. Su. Delay the case, judge. Please. I want to get Su here.

We are in this case, my recollection is, at least a day and probably two and he is not here. Now aside from the forensics associated with that, I made an inquiry to you to my recollection and I said where is Mr. Su? Or words to that effect. And you said to me that he was about is business within the community and would be here at the appropriate time. Not exactly consistent with asking for that continuance of a couple of days, all right?

Now, under the circumstances and given the, this seems to me that it was entirely appropriate for me to impress upon Mr. Su that he was not to go about his business the next day, that he indeed was ordered to return. Now, ordering him the return under those circumstances, as a matter of fact any circumstances, but those circumstances, is totally appropriate and under no circumstances is indicating nay bias, prejudice, animus, et cetera and to suggest otherwise is to totally torture what happened.

Next, number four, commenting that defense counsel better watch himself because the court is going to be trying the related liable suit, I believe, I can't recall the actual context, but I do recall the totality of the circumstances. There has been some controversy over the liable suit. I don't know the merits of the liable suit. It has generated considerable animus between the parties, the attorneys, but obviously that is not my concern. I thought and still think that the interests of justice are best served by having one trial court for this entire dispute and it shouldn't be split up, so to speak. I, in effect, volunteered to take the case. I didn't take the case because I am seeking out the respective company of the attorneys. I can assure you that. Far from it. I did it because I thought that the judicial system was best served from a judicial economy standpoint by one judge trying it rather than reacquainting another judge.

Now, I have, from time to time during the course of this lawsuit, disagreed with you as regards the procedures that you have employed or the lack thereof, and also with your objections and

there have been other disagreements that have been put on the record.

I think that this statement that I made arose under those circumstances. And if you understood my statement to believe I will handle the lawsuit, the liable lawsuit and I will take care of you and/or your client, you misunderstood totally what I was saying. I intended to make it clear that you were not going to create an appearance of bias on my part in order to seek a transfer of this case to another court. In no way did I intend to convey that I would try your liable case in an unfair manner. And I have now addressed that issue.

Next, making observations about the helpfulness of plaintiff's witnesses before defense counsel had an opportunity to cross-examine them. I allude again to the Pau case but I don't just depend on the Pau case. Instead I want to reflect back on when that statement took place. It took place, I believe, following the Anders testimony. You will recall that as a preliminary matter I suggested to counsel for the plaintiff that I didn't see any need for expert testimony regarding the proposed testimony of their expert who proved to be Anders. What I was saying was and what I still feel is that upon reflection he was helpful to my understanding of the products.

Now, that isn't a prejudgment. That is an observation that I was wrong. Indeed that testimony assisted me. It doesn't mean that I agree with Mr. Anders. It means he identified for me matters that I wouldn't have otherwise been aware of. It demonstrates perhaps a lack of sophistication on my part, but it doesn't mean that I agree with Anders. He just raises issues that needed to be raised. And it doesn't mean that I wasn't listening to his testimony on cross-examination. It doesn't mean I reached a final decision. I hadn't, and haven't to this juncture. It hasn't, and haven't to this juncture. I hadn't, and haven't to this juncture. It hasn't been tested by all the testimony in the case.

Next, suggesting that Frank Su was not telling the truth regarding his hernia operation on page 1174, I can't recall everything that has transpired in this case, but I do recall that there was some difficulty with compliance on the part of you,

Mr. Klayman, with respect to the local rules. When this case first came before this court we had, as is mandated by the federal rules of civil procedure, a status conference. In that status conference it is my custom and practice not to take names and numbers of the parties and give a trial date. Quite the contrary. I try to undertake a searching status conference in order to identify the issues to see if there is a chance of resolving the case and also to assess the complexity and time that the case will take.

This court, unlike most of the other courts in this building, has roughly 300 civil cases on its docket, 300. Not all of them have the complexity of this case. Some of them are more complex. Some of them have the potential for a more lengthy trial. But in addition to those 300 cases there are the criminal cases that come through and they displace the civil litigants and it is very very difficult to manage a calendar in a metropolitan community such as this, very difficult. It is a wonder to me that the clerk who sits in front of me maintains her mental well-being and she does. I have never seen her get upset. Why, I don't know, but she manages it, be that as it may. Here we are, what happens to criminal cases. I had one case here about a year and a half ago, seven-month trial, three to 500 million dollars laundered by these people down at the jewelry mart, biggest money laundering case in the country, dubious distinction. Lengthiest case in the history of this courthouse, dubious distinction. Complex, I am telling you, you are going to get the mother of all criminal appeal decisions out of this case, it is going to blow your mind it is going to be such a complex decision and you know who had to pass on all those issues before it got there? Me. And I don't know when another case like that is going to come in.

You have been displaced from time to time during this trial by sentencings, by pleas, and it will take place. On top of that we have our cases where people come in for temporary restraining orders, preliminary injunctions. It is an extraordinary busy court. And the federal system is such that it is our ordain that there will be individual calendars. I have got to tell you as an aside I don't know that an individual calendar is all that good an idea, but if you get into a master calendar situation as we have in the state you

don't move cases for obvious reasons. So we are with an individual calendar. That being the case I have to maintain a tight rein on my calendar. And if I don't do it you have got chaos. And you do have chaos in some courts around this land where people don't know how to maintain their calendar.

Now, to go on to the facts in our case, I made a determination early on that this case was going to take a considerable period of time. I had no idea that you people would wrangle over everything and that there would be a failure of compliance with Title 35 which would give further problems, and that there would be discovery problems that had not seemingly been addressed. I didn't know that. This case fortunately is not the norm. This is a very unusual case in that sense. It is an ugly case the way you two sides have been involved in this, very ugly. It is my job to sort it out, I will do it.

But, turning to what happened here, we had the 11th hour, as I recall it, request for continuance. Now mind you, I blocked out the time and it is very very hard to find the time to address a case like this, very hard. Mind you, we had to go through well, you didn't demand a jury, one more problem that had to be addressed so we had to address that problem also. So we get into a situation where we have got a non-jury trial and I have to find the time, very hard, 11th hour we get a request that the case be continued.

Now, in that regard there was a representation that Mr. Su needed to undergo hernia surgery. Now I want to tell you something, Mr. Klayman, I have never had hernia surgery, but about two years I represented the California Hospital Association. And I represented most of the big hospitals in this community and in that regard I was privy to a good deal of medicine. And I know the difference between an elective surgery and an emergency surgery. And I know that nine plus times out of ten a hernia operation is an elective surgery. So when at the 11th hour somebody says I need surgery right away and it is a hernia, I arch a brow. It doesn't make any difference whether it is Frank Su or a criminal defendant. Interestingly, fortuitously, we had a case in here this morning, some people got a ranch in the southern part of

this district, and one of the defendants has asked for a continuance. Judge, I have been diagnosed as perhaps cancer in my breast, and I want a continuance. What did I do? Well, I think you know the answer. I asked for an affidavit from her doctor and if I didn't do that I better hang it up.

What is the name of that case, for the record, Sara?

THE CLERK: United States versus Zebra.

THE COURT: We are dealing with Ms. Zebra, the very same thing happened this morning. I would be engaging in judicial malpractice. I would be a simpleton of the first water if I just bought off on everybody who comes in here and says I need a continuance, I have got an ill client. That doesn't mean you don't have an ill client. But I have to follow up on that particularly given a case of this nature. This is not the one-day variety. So what I did with your client is entirely consistent with what I would do with anybody and it was enhanced, if you will, by the nature of the surgery, i.e., what I normally perceive to be elective surgery.

Next issue that you address, threatening defense counsel with contempt and sanctions. I have been around the criminal justice system as a prosecutor, both as an assistant and as the United States Attorney for eight years and I have represented so-called white collar defendants and I have tried a great many civil cases, many varieties and I have been on the bench seven and one half years and I have never ever seen anything like what you did the other day. I told you at least six times to be quiet and you continued to talk.

Now, I will tell you, Mr. Klayman, that not to punish you, but to maintain the integrity of the system and try the case in an orderly fashion it would have been well within my discretion to hold you in contempt for what you did. Now, if I had this animus that you say I harbor, I would have been looking for that chance, Mr. Klayman, and I would have got you, the way you put it. I didn't do it, Mr. Klayman. Now, I think that is strongly reflective of the court's state of mind, but aside from that, the fact of the matter is that you were indeed scolded and addressed very strongly and properly so.

Next issue, commenting the defense counsel had difficulty reading two pieces of door hardware, page 1174. I don't believe I ever commented on your reading ability and if I did I misspoke. What I commented upon was the fact that you confused the respective products. I don't remember which ones they were now, but you confused them. There isn't any doubt about that in my mind. You confused them. And I did observe that.

Lastly, meeting out, quote, abuse, unquote, on Frank Su and defense counsel. I have alluded to the problem and/or problems that I have had in this case in conducting a trial in a fair way and in a procedurally effective way. They are almost without parallel when it comes to this lawsuit. You have got a 282 problem that you created which generated what you call the abuse. We have spent or we did spend the better part of a day addressing an issue, namely, the 282 problem that had no place being involved in this case, rudimentary practice dictated that you give 282 notice. Interestingly enough that wasn't the end of the 282 problem. It came up again yesterday.

Now, having to go through this did indeed cause me to castigate you. It has no impact on the trial of this case. The fact that you will not respond to a question that I ask on many occasions, and there have been innumerable occasion when I ask you a question and you slide off it like the proverbial artful dodger. You don't give me an answer. I have never had an attorney do what you do in that regard. Did I castigate you for that then? Yes. Do I castigate you now? Yes. You are supposed to answer the court's question and you don't do it a lot of the time.

Next, your objections, to my way of thinking, on many occasions are speaking objections to educate your witness, number one, and/or number two, improper objections with no legal basis, obviously no legal basis. You have done that with such repetition that I have addressed that issue. If that is your idea of abuse, then so be it. It is my idea that I need to communicate to you that I think you are incorrect.

I have addressed each and every one of the matters that you have, at least I have attempted to that you have raised and if

you want to give me any further input do it in writing. There will be no further argument on it.

I will not recuse myself because of the Masco situation. I made it abundantly clear that I had no idea Masco was involved and you seemingly indicated it was proper until you thought things were perhaps moving in the wrong way for you. I believe, irrespective of your view. that this court can properly try this case because at all times in issue here, I had absolutely no interest and I don't even know that the interest I had in the first place was such to cause a refusal quite frankly. And I still don't make any rulings at all on this case until well after the sale of that stock.

APPENDIX E - EXCERPTS FROM TRIAL TRANSCRIPT CONTAINING JUDGE KELLER'S SUA SPONTE PROPOSAL FOR PRO HAC VICE SANCTIONS

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

pp. 109-116

THE COURT: I am not going to award attorneys fees in that regard.

Now, pro hac vice. Let me cite you to 2.2.3.1. of the local rules. And I do this all in the context of saying that I have in almost eight years of sitting on the bench and 23 more years being a lawyer, never seen this pro hac vice issue come up before. It is remarkable that this has presented itself the way it has. And I am very loath to get involved with something like this, but I must protect the system. It is so endemic in the presentation of this case that when I put together a checklist of the failings of this counsel, I was appalled.

2.2.3.1 is entitled Permission Pro Hac Vice. It says in part: "Any person who is not otherwise eligible for admission to practice before this court," and I take it you are not admitted in the State of California, Mr. Klayman?

MR. KLAYMAN: No.

THE COURT: "But who is a member in good standing and eligible to practice before the bar of any United States court and who has been retained to appear before this court may upon written application and in the discretion," I stress that, "in the discretion of the Court be permitted," I underscore permitted, "to appear and participate pro hac vice in a particular case."

No this, is a matter of accommodation. And my view that I will let you speak to, Mr. Klayman, is that you seriously violated many of the standards of practice and that you should be precluded henceforth from practicing in my court and that I will issue an order, I can't bar you without referring you to the disciplinary committee, I will issue an order which will set forth your transgressions if you do not convince me to the contrary, which order you must file with the clerk of this court any time you seek to appear in pro hac vice. I want that judge who gets the next case you have coming here to know about you. That judge is going to know that I precluded you, except for this liable case, to ever practice in front of this court again. I have never seen anything like what you have done here.

Now, in no particular order, I have written down the following observations:

Multiple objections without any arguable basis to the facts or law and many that simply did not apply whatsoever to objections, evidentiary objections. The evidentiary competence displayed by you was sorely lacking. Repeatedly you made speaking objections that appeared, in my view, and I am saying for the record not to accredit myself -- I am seeking to accredit myself for anybody who reviews this, but I am not seeking it as, I am not stating it as puffery -- but in my view borne of 31 years of trial practice, and that is all I ever did, I have never been somebody so egregiously violate court rulings as you did here. I told you not to make any more speaking objections. And in my view you were attempting to coach witnesses on several occasions and you continued to do so despite my admonition.

Next, you wouldn't be quiet when I told you to be quiet on more than one occasion. I believe it rose to the level of

contempt, contempt, and I was forced to use my gavel rather than raising my voice. It was gross the way you disobeyed this court when I told you to be quiet and on more than one occasion.

You were singularly unwilling to answer questions that I asked of you as an officer of the Court though I requested and indeed finally was driven to the point of ordering you to answer the question.

You didn't conduct yourself in a timely fashion in this case. The jury demand was late. The 282 demand notice was not made. The answers to requests for admissions were inappropriate and/or untimely.

You didn't obey the court's orders regarding the filing of documents and pleadings during the course of the trial nor to give me the input when I ordered it. Mr. Neuner had to remind me on several occasions. He hadn't complied yet, judge.

Your delay regarding Frank Su, I do not believe was forthcoming. You were doing it for another reason, namely, to serve your purpose to woodshed him and understand further what his position was, but you didn't need that continuance from the standpoint of this court. You should have been prepared to go to trial. You were prepared to go to trial, all alternatively, you weren't prepared to go to trial and under the guise of having to have Frank Su here at trial you got a further continuance which you never should have gotten and if you did have to, you should have said I need to talk to my man, judge. I am not going to have him here. You led me to believe he was going to be here and I think that was, at the very least, a misrepresentation.

Have you ever had any prior problems with any other courts where you have been denied pro hac vice or sanctions?

MR. KLAYMAN: No, Your Honor.

THE COURT: Never, at any time?

MR. KLAYMAN: No.

THE COURT: Eurotech, you represented there was a patent, flat out you represented there was a patent after you studied this case. The plaintiff questioned you on that. You were required to make a filing to satisfy the court that there was a patent. You didn't make the filing. Mr. Neuner called it to my attention and

you stated that you couldn't find it and you were not pursuing the issue. I find that that was either negligent or not in good faith.

Next, you represented that Sepco was late discovered evidence and regarding prior art third-party use. I told you, and I unequivocally stand by this, very clearly, Mr. Carter contradicted you and he said that I told my counsel, he said, he took three approaches, almost immediately, in response to my questions, he took three approaches. He said almost immediately or when I was at a trade show or certainly before close of discovery and you take your choice, he identified those things, and your law firm was aware of this and you never brought it to my attention.

You were requested and/or instructed not to make editorial comments to include references to your clients' financial situations, and to otherwise editorialize. You repeatedly violated that request and/or instruction by this court up to and including today.

And under those circumstances, my provisional finding is, my finding provisionally is this, number one, you will not practice absent the liable suit ever again in my court, as an attorney, number one.

And number two, you must serve on any, I am going to serve a copy of my order on the clerk of this court and the other judges, and whenever you file to apply in the future, it does not account for Judge Rafeedie's case, you may certainly practice there and you do not have to bring this to his attention, but you are advised that -- and any cases that are underway here where you are representing now, this is up to a court to make a determination what it was to do -- but you have to serve a copy of this on all courts before which you are practicing now and if you ever attempt to appear pro hac vice in this district again, you must file with that application a copy of my order that I am proposing, which order is going to preclude you for the various reasons I have identified ever practicing in this court again.

Do you want to be heard?

MR. KLAYMAN: Yes, I do, Your Honor.

Let me just say at the outset, I think that my demeanor in the record will show that I have always been respectfully

towards the court, towards you, towards Mr. Neuner and towards everybody on the other side.

With regard to the other side, with regard to the plaintiff, Your Honor, I have gone through seven weeks of trial being accused of everything. It got to the point where I was even accused of suborning perjury. And at that point, Your Honor prevented me from consulting with my client. There was in effect a, quote, a gag order, during a time when he was being accused of perjury.

Plaintiff's counsel obviously was not ...

APPENDIX F - EXCERPTS FROM TRIAL TRANSCRIPT CONTAINING ORAL MOTION FOR RECUSAL

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

pp. 1171-1177

MR. KLAYMAN: Your Honor, I'd like to make a general motion.

THE COURT: What's that? What's a general motion?

MR. KLAYMAN: May I ask for a recess to make a general motion?

THE COURT: No. You want to make a motion, you can make -- I don't know what you mean by a general motion. I've never heard of a general motion.

MR. KLAYMAN: I have a motion that I wanted to make at the closing of the plaintiff's case, but I feel that it may be more appropriate at this time.

THE COURT: What's the general motion?

MR. KLAYMAN: Should I take the lectern?

THE COURT: You can stand there, sit there, or take the lectern, whatever you want to do.

MR. KLAYMAN: Your Honor, it's only after great consideration that I make this motion. I've given it great thought; I've thought about it and I have -- it's not the kind of thing that makes me happy, and I say it in a grave voice.

I am convinced that I have to make the motion because I am counsel. I've taken an oath to protect my client zealously within the bounds of the law. And the motion is, your Honor, that I ask you to recuse yourself in this case. I know that we're all human. I'm human too. And I feel that sometimes you can prejudge an issue. And I have sat here throughout this case and I have listened to certain things occur. And I would not be doing my job as counsel if I did not make the motion, and the motion is made under 28 U.S.C. 455(A).

THE COURT: I'm familiar with 28 U.S.C. 455(A).

MR. KLAYMAN: And allow me to enumerate some of the bases for that, your Honor:

I believe, and I've made a record and I don't want to belabor the point here, because my intention is not to be abrasive; my intention is not to do anything other than my job.

But I sat here and I've listened to comments that have reflected that my client is not telling the truth, that you referred to -- and when I questioned that, your Honor, that statement, your Honor disagreed with it and pointed out that this was not true. I got a very strong reaction.

You've referred to Richard Carter, one of my clients, as a Richard Carter and his ilk. In addition to questioning my client's honesty, you have ordered him back to the witness stand, and I felt it was ordered in a very strong and negative way, and I questioned that, and I pointed out that you didn't do that with Mr. Sturrus. And you raised the issue that you treat everybody the same regardless of national origin. Your Honor, that was a non sequitur in that context.

You've made comments that, Mr. Klayman, to the effect that you'd better watch yourself here, because I'm going to be trying the libel suit. The libel suit doesn't have anything to do with this case.

You've made comments about the plaintiff's witnesses before I had the opportunity to cross-examiner those witnesses in terms of their extreme helpfulness towards the case; and it was at that point that, in my view, sitting here, made you explode. I'm not concerned with your approach towards me. I am concerned about it toward the client, however.

You early on during this proceeding questioned and suggested that Mr. Su is not telling the truth when he had hernia operation and could not be here.

We submitted medical evidence and letters from Mr. Su stating that, in fact, he did need that operation and, in fact, we also submitted letters and documentation showing that he wanted to go to trial. I released some attorney-client information that he'd sent to me saying he was anxious to go to trial, yet you questioned whether he wanted to be in trial and you made remarks in this case about him not showing up the first time, and that's why you ordered him back to the stand.

You have threatened me with contempt and sanctions. I think the record is clear that I am tying to do my job, your Honor. I have not been in any way negative towards either you or opposing counsel.

You have cut me off virtually at every opportunity to give an objection and to explain it. And I've started to ask if I could have permission to explain, because I want to have an orderly proceeding, and you cut me off from that, too.

You made comments about a problem I had reading an exhibit, suggesting that the fact that I couldn't read exhibits on two pieces of door hardware suggested confusion in the case.

THE COURT: The confusion that was replicated with Mr. Su on the stand today when he said he identified the product -- I have a note on that. Yes, I did make that observation.

(Brief pause)

Exhibit 16. The witness stated that the product was his, unequivocally. Mr. Neuner, quite frankly, asked another question and got an answer, "well, I don't know." When he has an answer: "It is my product."

So then, to reinforce it, "That's your product?"

"Oh, well, I'm looking at it closely now; no, I don't think it's my product."

That's exactly what happen in here. Okay?

MR. KLAYMAN: Your Honor --

THE COURT: And I want to say that you must, of course, make your record, Mr. Klayman. But I can't help but observe that the mistake that he made today was a mistake that you made earlier in this proceeding.

Please continue with your observations and/or objections.

MR. KLAYMAN: Your Honor, there is no record that anything other than the fact that this man has been under a lot of pressure -- he's been testifying for a long time. I did not take the advantage that you took of him. But this is another indication that you have prejudged the case.

And your Honor, I sat here for two days, and whatever the case may be in terms of how you perceive our client and myself, we took a tremendous amount of what I perceive to be abuse -- layered on top of the fact that admittedly at some point in this case you had a prospective interest, potential interest in Masco.

I have to say, your Honor, that the standard here is whether -- and there's a case, Fawn versus American Air Lines, 431 1334, Northern District of California, 1977.

THE COURT: What judge is it?

MR. KLAYMAN: I don;t have the name of this judge, your Honor. It's one of a number of similar cases, wherein it states: The charge of lack of impartiality must be grounded on facts which would create a reasonable doubt concerning the judge's impartiality. Not in the mind of the judge or even necessarily in the mind of the litigant, but rather in the mind of a reasonable person.

And sometimes, your Honor, when you yourself are involved -- I mean you plural, not you, your Honor -- it's hard to see what may be occurring. The standard here is the reasonable person, your Honor. And I submit, and I submit strongly, and I'm not in any way happy about this. I think if anybody sees my demeanor here, I'm shaking a little bit because I've never done this before. But I firmly believe, and I'm sure that the record will

reflect that this is that case where indeed prejudgment has occurred, and I ask you, your Honor, as a man of integrity, to recuse yourself of this case.

THE COURT: Your motion has been made, Mr. Klayman, and my observation in this bench trial have been shared with you as trier of fact. And as I think I said at the time in issue, I as an advocate for my client was always most interested in how the trier of fact was responding.

I've given you an opportunity to respond from time to time, and I feel I've done so properly. I was critical and I am critical of the manner in which you've conducted this litigation. You are in no way redounded to the detriment of your client. But you didn't procedurally even come close to obeying the rules that are applicable to this case.

I came to a very, very significant part of your case. I want you to know that the hearing that took place that lasted hours should have been totally unnecessary, and indeed I was critical of you then. And I shared that criticism with you because I don't want to encourage any further improprieties from the procedural standpoint on your part. And what begot your statement just now as yet ...

APPENDIX G - MEMORANDUM IN SUPPORT OF MOTION TO STAY PRO HAC VICE ORDER

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

MEMORANDUM IN SUPPORT OF EXPEDITED MOTION FOR STAY OF ORDER RE: PRO HAC VICE STATUS OF LARRY KLAYMAN

I. INTRODUCTION.

On June 30, 1992, the Honorable William Keller issued an order sanctioning attorney Larry Klayman for claimed misconduct before and during the above-styled proceeding. For the reasons set forth to the court, orally and in writing, at the close of the trial on June 24, 1992, Larry Klayman submits that he committed no misconduct. Accordingly, he had asked the court to reverse its proposed findings both with regard to the 28 U.S.C. 1927 and pro hac vice issues. Attorney Klayman respectfully requested this reversal, not only because he committed no misconduct, but also because the Court's findings would negatively impact on his professional reputation, as well as ability to effectively represent on-going client interests in the proceedings before the U.S. District Court for the Central District of California. Attorney Klayman submits that he currently has a good reputation in the professional

and lay communities. (Exhibit 1). However, on June 30, 1992, the court issued the subject order in any event.

This order, which has been filed in the court's "public file", and which the court ordered be attached to any future *pro hac vice* application, is severe in its intent and content. it will likely be reported throughout the legal system and used by legal adversaries of Attorney Klayman's clients in other proceedings.

II. DISCUSSION.

Because of its severity, and likely negative impact, Attorney Klayman has decided to retain counsel to argue for its reconsideration and any other appropriate remedy. For this reason, Attorney Klayman respectfully asks the court to stay enforcement, for 60 days, of its order of June 30, 1992, to allow him to retain suitable counsel to review the entire proceeding -- including the court transcript -- and in order to move for reconsideration and take whatever remedial action is deemed appropriate.

III. CONCLUSION.

Out of fairness and equity, Attorney Klayman respectfully asks the Court to stay enforcement of its order for 60 days to allow sufficient time for him to retain counsel and review the court file and transcript, move for reconsideration, and take whatever remedial action is deemed appropriate. A stay of 60 days will not work prejudice to any party, as Attorney Klayman does not plan to, and will not, apply for pro hac vice entry into this District during that period.

To avoid prejudice to Attorney Klayman, it is respectfully requested that the Court's June 30, 1992, order be filed under seal pending the expiration of the 60-day period.

DATED: July 14, 1992 Respectfully submitted,

Larry Klayman, Esq.
Richard J. Burke, Esq.
KLAYMAN & ASSOCIATES, P.C.
501 School Street, S.W.
Suite 700
Washington, D.C. 20024
(202) 646-5160

Thomas P. Davis
Peter D. Holbrook
Gail H. Morse
MCDERMOTT, WILL & EMERY
1301 Dove Street
Suite 500
Newport Beach, CA 92660-2412
(714) 851-0633

Attorneys for Defendants

APPENDIX H - MOTION FOR ADDITIONAL EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION OF PRO HAC VICE ORDER

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

EX PARTE APPLICATION REQUESTING (1) ADDITIONAL TIME TO FILE BRIEF AS DIRECTED BY COURT ORDER OF JULY 17, 1992 AND (2) THAT MOTION FOR RECONSIDERATION BE FILED UNDER SEAL; MEMORANDUM OF POINTS AND AUTHORITIES; and DECLARATIONS IN SUPPORT THEREOF

Larry Klayman ("Klayman") hereby applies through counsel *ex parte* for an extension of time within which to respond to the Court's Order of June 30, 1992 ("Order") directing Klayman to file a motion for reconsideration of the June 30 Order on or before August 16. Under the Federal Rules of Civil Procedure, Rule 4 and the local rules of this Court, Klayman's response would be due not later than August 17, 1992. Klayman has attempted to secure copies of the transcript of proceedings of June 22 and June 24, 1992 which are highly pertinent if not indispensable to his ability to respond to the Court's Order and the absence of which will be prejudicial to Klayman's effort to respond.

Klayman also seeks an order directing that the motion for reconsideration and all related papers be filed and hold under seal pending the Court's decision.

This application is based on this application, the attached memorandum of points and authorities and declarations of Timothy J. Harris and Patti Lavine and is made pursuant to Local Rule 7.18.

DATED: August 12, 1992 CHARLSTON, REVICH & WILLIAMS
TIMOTHY J. HARRIS
ROBERT D. HOFFMAN

By:_____
Timothy J. Harris
Attorneys for Respondent
Larry Klayman

MEMORANDUM OF POINTS AND AUTHORITIES

COUNSEL OF RECORD FOR OTHER PARTIES

Plaintiffs counsel is Robert Neuner of Brumbaugh, Graves Donohue & Raymond (212) 408-2560. Our efforts to reach Mr. Neuner have been unsuccessful. Defendants counsel is Mr. Larry Klayman of Klayman & Associates, P.C. (202) 646-5160. Mr. Klayman as no objection to this application.

FACTS

From May 7, 1992 through June 24, 1992, the firm of Klayman & Associates, P.C., through Larry Klayman, appeared as counsel for defendant FrankSu Enterprise Corporation, FrankSu and Decorators Accessories, Ltd. in that certain civil matter entitled "*Baldwin Hardware Corporation v. FrankSu Enterprises Corporation, et al.*" Civil Action No. 904919 WDK (Bx) pending in United States District Court in the Central District of California. The patent and trademark case was tried before the Honorable William D. Keller.

At the close of trial, Judge Keller advised Mr. Klayman that any further application to practice *pro hac vice* before Judge Keller would be denied and directed Mr. Keller to attach a copy of the Court's order to any future *pro hac vice* in the Central District of California.

The Court issued its order on June 30, 1992. On July 17, 1992, the Court granted Mr. Klayman's motion for a stay of the June 30 Order and placed the June 30 order under seal pending further decision of the Court. The Court directed Mr. Klayman to file a motion for reconsideration of the June 30 order within thirty days of the July 17 order and stated that "no extension of time will be granted."

Pursuant to Rule 4 of the Federal Rules of Civil Procedure, the motion for reconsideration must be filed on or before August 17, 1992.

I. COUNSEL IS UNABLE TO EVALUATE THE NEED FOR AND OBTAIN PORTIONS OF THE TRANSCRIPTS IN TIME TO COMPLY WITH THE AUGUST 17 ORDER

Mr. Klayman and the undersigned counsel believe that portions of the trial transcript are indispensable to Mr. Klayman's motion for reconsideration. Unfortunately, the transcript portions cannot be obtained in time (despite good faith and diligent efforts to do so) to evaluate and file with the motion an August 17. This *ex parte* application requests the Court to continue the time for filing the notion from August 17 until September 17.

On approximately June 24, Mr. Klayman requested from court reporter Ms. Lois Anderson, a quotation concerning the cost of obtaining complete copies of the Court's proceedings on the afternoon of June 22 and June 24, 1992. Mr. Klayman did not receive a response and then telecopied a letter on August 3, 1992 to Ms. Anderson at a facsimile number provided to him by the Court. Mr. Klayman received no response to the telecopied letter.

Mr. Klayman retained counsel for the purpose of responding to the Court's June 30 Order on August 6, 1992, Counsel made further inquiry of the court clerk. Counsel's secretary was advised that Ms. Anderson had been ill and had not received Mr. Klayman's letter of August 3 (Lavine Decl.) Not until Monday, August 10, 1992 did counsel for Mr. Klayman receive a telephone call from Ms. Anderson, who had been out of town. (Harris decl, ¶4) Ms. Anderson has advised that the portion of the transcript we initially requested, the afternoon of June 24, can be ready by noon on August 12. Counsel does not believe that this will allow sufficient time to analyze this portion of the transcript. Moreover, Counsel believes that further transcript references may be needed and that insufficient time is available to identify and secure them from the Reporter before August 17.

Counsel has requested access to transcript copies that were reportedly obtained by plaintiffs (Harris decl., ¶3) but not response to this request has been received.

Under the circumstances, counsel has been unable to obtain, despite due diligence, a copy of proceedings at trial which are pertinent to the motion for reconsideration since they will provide counsel with the Court's official record of what was said by the court as well as by Mr. Klayman and which Mr. Klayman seeks to include in his motion for reconsideration.

Since it would be neither fair nor appropriate to require Mr. Klayman to respond to the Court's June 30 order without an opportunity to review the actual transcript of proceedings pertinent to the Court's order, Mr. Klayman hereby requests a further continuance of thirty days in order to allow the court reporter to complete the transcription requested and include it in the motion for reconsideration as is appropriate.

II. CONFIDENTIALITY OF THE MOTION AND RELATED PAPERS

The Court's July 17 order directed that the June 30 Order be held under seal. To assume that the purpose of the July 17 Order is not defeated, Klayman requests that the Court order that the motion for reconsideration and all related papers also be filed under seal and be kept confidential by the parties and their counsel pending the Court's decision on the motion for reconsideration.

DATED: August 12, 1992

CHARLSTON, REVICH & WILLIAMS
TIMOTHY J. HARRIS
ROBERT D. HOFFMAN

By:_____
Timothy J. Harris
Attorneys for Respondent
Larry Klayman

APPENDIX I - MOTION FOR RECONSIDERATION OF PRO HAC VICE ORDER

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CV 90-4919 WDK (Bx)

BALDWIN HARDWARE CORP.,
Plaintiff,

v.

FRANKSU ENTERPRISE CORP. ET AL.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION AND ORDER THAT *PRO HAC VICE* AND 18 U.S.C. 1927 PLEADINGS AND ORDERS BE PLACED OR REMAIN UNDER SEAL AND BE DEEMED CONFIDENTIAL, PENDING DISPOSITION OF APPEAL; DECLARATION OF LARRY KLAYMAN IN SUPPORT THEREOF

I. INTRODUCTION.

Respondent, Larry Klayman, previously moved this Court for an order placing its June 30, 1992 *pro hac vice* order under seal, as well as providing 60 days to move for reconsideration of this order. On July 17, 1992, the Court granted the motion placing the June 30, 1992 *pro hac vice* order under seal, but granted only 30 days to file a motion for reconsideration. Attorney Klayman had requested 60 days to obtain authorization from his firm's professional liability carrier to retain counsel on his behalf; to review the extensive trial record, and for counsel to then prepare and file a motion for reconsideration on his behalf. Moreover, a

60 day period was required to identify and obtain relevant portions of the trial transcript -- which excerpts were absolutely required to move for reconsideration. Unlike plaintiff, Baldwin Hardware Corporation, neither Attorney Klayman nor his clients had ordered a daily copy of the entire transcript during trial, because of their inability to pay for it. When Attorney Klayman and defendants have requested access to plaintiff's trial transcript, these requests were steadfastly refused.

On August 13, 1992, counsel for Attorney Klayman -- which had been appointed by the professional liability carrier only on August 6, 1992 -- moved for a 30 day extension to prepare and file a motion for reconsideration. This extension, if granted, would have provided the initially estimated and requested 60 days to file the motion. The primary reason for the request was to provide time to obtain copies of relevant portions of the trial transcript, which had not proven possible due to the apparent unavailability of the Court Reporter during the intervening time period.

On August 14, 1992, one working day before the motion for reconsideration was due under the Order of July 17, 1992, the Court denied Attorney Klayman's *ex parte* application for a 30-day extension of time.

II. DISCUSSION

Without the additional 30-day extension of time, attorney Klayman and his counsel do not have the means to prepare a motion for reconsideration based on specific reference to the entire trial record. Accordingly, in order to prepare his challenge to the Court's *pro hac vice* Order of June 30, 1992, with as much specificity as possible, by making specific reference to relevant portions of the Court transcript, Attorney Klayman respectfully requests that the Court reconsider its June 30 Order based upon the attached declaration of Larry Klayman. Upon reconsideration, it is requested that the Court order as final, its Order of June 30, 1992 as reconsidered, so that Respondent may take a timely appeal to the higher court. In addition, to avoid further injury to his reputation and his client interests, Attorney Klayman respectfully requests that all pleadings referring or relating the Court's

pro hac vice order of June 30, 1992, be ordered placed and kept under seal, as well as designated as confidential under the parties' protective order. (See Attorney Klayman's Motion for Order to Show Cause). As the issues related to plaintiff's 18 U.S.C. 1927 motion, and the Court's *pro hac vice* sanctions are related if not identical, Attorney Klayman respectfully requests that these pleadings be accorded similar treatment. As set forth in Attorney Klayman's Motion for Order to Show Cause, filed on July 24, 1992, plaintiff as well as opposing counsel in another case (*Jepson, Inc., et al. v. Makita USA, Inc., et al.*, No. 90-4312 ER (GHKx) (C.D. Ca.)) have already sought to severely harm Attorney Klayman by publishing these sanction orders and pleadings to both Judge Rafeedie and the public. To allow Attorney Klayman an opportunity to protect his important professional and client interests, without risk of further harm, it is only fair and just that these sanction orders and pleadings be placed and kept under seal, and ordered to be kept confidential by the parties, pending the disposition of appeals to the higher court.

III. CONCLUSION

For all these reasons, Attorney Klayman respectfully that his motion be granted.

DATED: August 17, 1992 Respectfully submitted,

By:_____

Larry Klayman, Esq.
Richard J. Burke, Esq.
KLAYMAN & ASSOCIATES, P.C.
501 School Street, S.W.
Suite 700
Washington, DC 20024

Thomas P. Davis
Peter D. Holbrook
Gail H. Morse
MCDERMOTT, WILL & EMERY
1301 Dove Street
Suite 500
Newport Beach, CA 92160-2412

Attorneys for Defendants